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April 26, 1996

BY HAND DELIVERY

DOCKET FILE COPY ORIGINAL

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW - Room 222
Washington, DC 20554

Re: Comments of Playboy Entertainment Group, Inc.
Implementation of Section 505 of the
Telecommunications Act of 1996
CS Docket No. 96-40

Dear Mr. Caton:

On behalf of Playboy Entertainment Group, Inc. ("Playboy"), enclosed for filing are an original and eleven copies of Playboy's Comments in the above-referenced proceeding to implement Section 505 of the Telecommunications Act of 1996 (scrambling of sexually explicit adult video service programming).

If there are any questions regarding these Comments, please communicate with the undersigned counsel.

Respectfully submitted,

HOGAN & HARTSON L.L.P.

By: Robert Corn-Revere
Robert Corn-Revere

Attorneys for Playboy
Entertainment Group, Inc.

Enclosures

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 505 of the Telecommunications Act of 1996	)	CS Docket No. 96-40
	)	
	)	
Scrambling of Sexually Explicit Adult Video Service Programming	)	
	)	

COMMENTS OF PLAYBOY ENTERTAINMENT GROUP, INC.

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April 26, 1996

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23. Affidavit of James L. English, President, Playboy Networks Worldwide.

Summary

On March 7, 1996, the United States District Court for the District of Delaware issued a Temporary Restraining Order enjoining the federal government, including the Commission, "from enforcing or implementing Section 505 of the Telecommunications Act of 1996 in any manner." *Playboy Entertainment Group, Inc. v. United States*, Civil Action No. 96-94 (D. Del. Mar. 7, 1996). The TRO was issued one day after a hearing in which Playboy Entertainment Group presented evidence and argument that enforcement of Section 505 would impose severe restrictions on its ability to provide service to subscribers.

On March 5 -- one day before the TRO hearing on Section 505 -- the FCC released its *Order and Notice of Proposed Rulemaking* in this Docket, implementing what it described as certain "self effectuating" provisions of the law, and seeking comment on other aspects of the provision. The Commission implemented the scrambling requirements of Section 505(a) without prior notice or comment because it concluded that the section "simply incorporates a provision of the 1996 Act" that "involves no discretion." As to the applicability of Section 505 only to "channels 'primarily dedicated to sexually-oriented programming,'" the Commission without discussion concluded that "the statute is clear regarding what channels Section [505(a)] applies to."

The Commission defined indecency as "any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable or other

MVPD medium," and asserted that "the definition of indecent programming in the video programming context is well established." To further clarify the definition (and presumably answer charges that the statutory language is vague or overly broad), the Commission asserted that "it is clear that the term 'sexually explicit adult programming' in Section [505(a)] is merely a subset of the term 'programming that is indecent.'"

The Commission is taking the position that, based upon its "well established" case law for video programming, a cable operator will be able to distinguish between "sexually oriented" (but not indecent) programming on the one hand, and "sexually explicit" programming on the other. Armed with this information, the operator would then be able to scramble and unscramble the adult network as needed, whenever the programming veered from mere sexual orientation to the depths of explicitness. Alternately, the network programmer could use its understanding of this "clear" line to ensure that only acceptable sexually-oriented fare is transmitted before 10 p.m., while reserving the late night hours for "explicit" material.

Given that the Commission's interpretation was released one day before the TRO hearing in *Playboy Entertainment Group,* it appears to represent more of a statement of the government's litigation strategy than a serious proposal for interpreting and applying Section 505 As such, it is a pastiche of legal fictions that bears no connection to the Commission's indecency decisions or to the real world. The Commission's repeated use of the word "clear" to describe the scope of

Section 505 and the case law does not fool anyone or alter reality. Nor can the Commission escape its past decisions in this area simply by ignoring, or failing to disclose them.

In fact, the law of indecency for video programming is not well established, and it is not "clear" that "the term 'sexually explicit adult programming' . . . is merely a subset of the term 'programming that is indecent.'" Rather, the Commission's standard for indecency in video programming is exceedingly ambiguous -- and the ambiguities have been magnified by both the Telecommunications Act and the government's current litigation tactics. Worse still, the meaning of the term indecency has been shrouded by a body of largely secret case law that, even when accessed, only adds to the confusion. Accordingly, the Commission's best hope of salvaging the constitutionality of Section 505 would be to interpret the term "indecency" to be synonymous with "obscenity," as has been done in other cases.

Nor is there any basis for the Commission's assumption that Section 505 is "clear" regarding what networks are "primarily dedicated" to sexually oriented programming. The Commission makes this statement twice in the *Notice*, and the government has asserted in litigation that the term "primarily dedicated" does not require a definition beyond its "plain meaning." But the term has a "plain meaning" only if it is self-defining or there is an adequate legislative record from which to infer congressional intent. Neither is the case here.

Indeed, the last time Congress acted to control unintended access to what it deemed "sexually explicit" cable programming, it adopted measures that were aimed at premium movie services generally. Now that the Commission maintains that there are shadings of difference between the various terms employed in Section 505, including "sexually oriented," "adult," "sexually explicit," and "indecent," it is imperative that the agency define all its terms, especially of "primarily dedicated," since it triggers the statutory obligations.

For reasons Playboy has expressed in its lawsuit, Section 505 is unconstitutional on its face. The First Amendment problems become more pronounced as the Commission seeks to extend the scope of indecency regulation to cover cable television. Nevertheless, the Commission has an obligation to try to make it more constitutional than it is. It could take a step in this direction by narrowing the definition of "indecency" in the context of cable television to mean the same thing as "obscenity."

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Implementation of Section 505 of the Telecommunications Act of 1996	)	CS Docket No. 96-40
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	)	
Scrambling of Sexually Explicit Adult Video Service Programming	)	

COMMENTS OF PLAYBOY ENTERTAINMENT GROUP, INC.

Playboy Entertainment Group, Inc. ("Playboy"), through its attorneys and pursuant to Section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, hereby submits comments in the above-captioned proceeding to establish rules for the enforcement of Section 505 of the Telecommunications Act of 1996. 1/

1/ Section 505 of the Telecommunications Act provides for the "Scrambling of Sexually Explicit Adult Video Service Programming," as follows:

> (a) REQUIREMENT -- In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such chanel so that one not a subscriber to such channel or programming does not receive it.
>
> (b) IMPLEMENTATION -- Until a multichanel video programming distributor complies with the

[Footnote continued]

Section 505 was due to become effective on March 9, and the Commission instituted the instant proceeding on March 5, 1996. Playboy sought, and received, a Temporary Restraining Order barring implementation or enforcement of Section 505 pending further judicial proceedings. 2/ The Commission subsequently announced that it would comply with the court order, but would nevertheless receive comments as scheduled. 3/ Although Playboy believes

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[Footnote continued]

> requirement set forth in subsection (a), the distributor shall limit accesss of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.
>
> (c) DEFINITION -- As used in this section, the term "scramble" means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.
>
> (d) EFFECTIVE DATE - The amendment made by subsection (a) shall take effect 30 days after the date of the enactment of this Act.

2/ *Playboy Entertainment Group, Inc. v. United States*, Civil Action No. 96-94, Temporary Restraining Order (D. Del. March 7, 1996), attached as Exhibit 1.

3/ Report No. CS 96-17, *Commission Will Not Enforce of Implement Section 505 of the Telecommunications Act of 1996 As Result of Court Order*, DA 96-354 (March 13, 1996).

that further FCC implementation of Section 505 through this proceeding will be unnecessary and a diversion of scarce resources, we submit the following comments.

Background

Playboy Television

Playboy is a Delaware corporation that produces and distributes cable video programming through its two programming networks, Playboy Television and AdultVision ("the Playboy networks"). The Playboy networks are provided only to adult cable subscribers and only upon request. Indeed, Playboy supports the use of scrambling or blocking technologies to ensure that access to both audio and video signals is limited to the intended subscribers. For that reason, Playboy has worked actively with cable operators to help make such technologies available, and is an enthusiastic supporter of the voluntary policies of the National Cable Television Association and the California Cable Television Association to make complete scrambling available to any subscriber who requests it. Playboy also supports Section 504 of the Telecommunications Act, which essentially codified the industry policies. 4/

4/ Section 504 of the Telecommunications Act provides for the "Scrambling of Cable Channels for Nonsubscribers," as follows:

> (a) SUBSCRIBER REQUEST -- Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.

[Footnote continued]

Playboy Television offers a wide variety of programming that is planned as an integrated package. This programming is similar to and patterned after *Playboy* magazine and consists of adult oriented lifestyle information, news, music, video fiction and short stories, comedy, and other programming, while AdulTVision primarily shows adult films. In addition to its regular programming, Playboy Television provides special programming such as its recent December 1, 1995 four-hour program on AIDS Awareness and safe sexual practices done in connection with the World AIDS Day created by the World Health Organization in 1988. *See* Affidavit of Anthony J. Lynn at ¶ 9, attached as Exhibit 2. 5/

Playboy has established standards and guidelines to determine what programming will be suitable for the Playboy networks. Playboy has four in-house lawyers who review all programming to ensure that it is neither obscene nor violative of community standards. No court or administrative agency in any jurisdiction has ever found the Playboy networks or any of their programming to be either obscene or harmful to minors. Similarly, in over forty years of publication,

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[Footnote continued]

> (b) DEFINITION -- As used in this section, the term "scamble" means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

5/ This Affidavit was submitted to the court in *Playboy Entertainment Group, Inc. v. United States*. It is being provided to the Commission as well for inclusion in the administrative record.

not one issue of *Playboy* magazine has ever been found to be obscene or harmful to minors by any judicial or administrative system, state or federal. On the contrary, the United States Attorney General's Commission on Pornography ultimately concluded that *Playboy* magazine "is plainly non-offensive." Affidavit of Anthony Lynn at ¶ 15, attached as Exhibit 2.

Although Playboy's publications and video productions have never been found to be "obscene," "harmful to minors," or otherwise to violate community standards, they have at various times been the target of misguided efforts to regulate what is loosely described as "pornography." For example, the Attorney General's Commission on Pornography during the Reagan Administration sought to deter sales of *Playboy* magazine by threatening to list retail stores as being "involved in the sale or distribution of pornography." The United States District Court for the District of Columbia enjoined the government's action, and ordered the Commission to withdraw its threat. *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986).

In another case, Congressman Chalmers Wiley was offended that the Library of Congress produced and distributed free copies of braille editions of *Playboy* magazine. 6/ When Congressman Wiley was unable to persuade the

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6/ Pictures and cartoons were not included because of the difficulty of reproducing them in braille. However, even when the entire contents of *Playboy* are available, the magazine is often provided in public libraries. *See Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1352, 1373 (5th Cir. 1980) ("'Playboy' has

[Footnote continued]

Librarian of Congress to stop publishing the braille edition, 7/ he sponsored an amendment to the House Appropriations Bill to reduce the appropriation for the Library by $103,000 -- an amount equal to the cost of producing *Playboy* for the blind. In introducing the amendment, Congressman Wiley stated that "I do not think the public should be left with the impression that the Federal Government sanctions the promotion of sex-oriented magazines such as *Playboy*." 8/ After funds were cut, the Library was forced to cease publication. But in litigation that followed, the U.S. District Court for the District of Columbia held that the government's actions violated the First Amendment, and ordered the Library of Congress to resume producing and distributing *Playboy* for the blind. *American Council for the Blind v. Boorstin*, 644 F. Supp. 811 (D.D.C. 1986).

These two cases represent only the tip of the iceberg. Whether motivated by a desire for censorship or by simple opportunism, politicians frequently have targeted *Playboy* as the subject of their witch hunts. Thus, in one notorious case, District Attorney James H. Evans in Alabama embarked on what

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[Footnote continued]

been published since 1953 and its subscribers include approximately 950 libraries in the United States.").

7/ The Librarian of Congress responded that *Playboy* fit "within the criteria for selection of periodicals" for braille production, and that it "surpassed Good Housekeeping and Ladies Home Journal in circulation." *American Council of the Blind v. Boorstin*, 644 F. Supp. 811, 813 (D.D.C. 1986).

8/ 131 CONG. REC. H5932 (July 18, 1985).

the court described as "a calculated scheme to provoke retreat by those who dared to sell sexually explicit magazines" including *Playboy*. *Council for Periodical Distributors Assn. v. Evans*, 642 F. Supp. 552, 562 (M.D. Ala. 1986). The District Attorney "steadfastly maintain[ed] that he sought at all times only voluntary cooperation," but the court found this to be a "cynical and evasive rationalization[] for illegal conduct," including "an informal system of prior restraint on the distribution and sale of sexually explicit magazines." *Id.* at 564.

Among other constitutional infractions, the court found that the District Attorney had "deliberately distorted the dividing line between obscenity and protected expression by equating sexual explicitness with illegal obscenity." *Id.* at 564. As a result, *Playboy* was at risk because the government's illegal activities targeted any publication "having a tendency, likelihood or propensity toward obscenity." 9/ Nevertheless, the court blocked the government's scheme, 10/ just as in every other case where courts have held the *Playboy* is not obscene, harmful to minors or indecent. 11/

9/ The court found that under this unconstitutionally broad decree "*Playboy* would be brought within its scope." *Council for Periodical Distributors Assn. v. Evans*, 642 F. Supp. at 560.

10/ *Id.* at 567.

11/ *E.g.*, *Bantam Books*, 372 U.S. at 62 n.4 (State commission created to protect youth from "indecent" publications targeted *Playboy*, among others); *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d at 1372; *Penthouse International, Ltd. v. Putka*, 436 F. Supp. 1220, 1229 (N.D. Ohio 1977) ("prohibition on the sale of 'all magazines and books which contain explicit pictures of nudity or explicit

[Footnote continued]

Unfortunately, the attitudes toward *Playboy* have been carried over from the previous cases into government "indecency" policies, including those of the FCC, while the legal lessons have not. A few local governments have attempted unsuccessfully to prosecute local cable operators for programming on *Playboy* television, 12/ and policymakers continue to use the term *Playboy* as a synonym for "indecency" or obscenity. For example, in advocating restrictions on "indecent" programming on leased access channels, Senator Jesse Helms cited *Playboy* television as an example of indecent programming. He stated that "leased access channels were intended to promote diversity, but instead they promote perversity. For example, the *Playboy* channel made its way onto a leased access channel in

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[Footnote continued]

descriptions of sexual activity' was an unconstitutional prior restraint"); *HMH Publishing Co. v. Garrett*, 151 F. Supp. 903 (N.D. Ind. 1957). *See also Johnson v. County of Los Angeles Fire Dept.*, 865 F. Supp. 1430, 1434 (C.D. Cal. 1994) (First Amendment bars government policy against "sexually harrassing conduct" that prohibits "[s]exually-oriented magazines, particularly those containing nude pictures, such as Playboy . . . .").

12/ *See, e.g., Playboy Enterprises, Inc. v. Public Service Commission of Puerto Rico*, 906 F.2d 25 (1st Cir. 1990); *Gates v. Ney*, 785 F.2d 308 (6th Cir. 1986) (unpublished disposition) (see 1986 WL 16424).

Puerto Rico." 13/ Both the FCC and the D.C. Circuit have cited Senator Helms' statement as an indication of legislative intent. 14/

Similarly, the Commission has found that disc jockeys reading from a *Playboy* magazine on the air could be cited for indecency. *Letter to Merrill Hansen*, 6 FCC Rcd. 3689 (1990). 15/ The reading at issue involved the alleged rape of Jessica Hahn by Reverend Jim Bakker and involved a matter of obvious public interest. The Commission noted that "the newsworthy nature of broadcast material" was a "relevant contextual consideration[]," but it nevertheless concluded, without discussion, that the presentation was "pandering." *Id.* Given the fact that far more graphic or "titillating" broadcasts have been exonerated from indecency findings in cases where there was no defense based on merit, it does not appear to be coincidental that the FCC fined a station whose employees read from *Playboy*. Judge Patricia Wald noted that "this incident and the Commission's discussion of it

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13/ 138 CONG. REC. S646 (daily ed. Jan. 30, 1992) (Statement of Sen. Helms). In another statement in which he cited Playboy Television, Senator Helms sponsored an amendment to the 1992 Cable Act to remove legislative immunity for cable operators that carry "obscene" programming on leased access channels. *Id.* at S652.

14/ *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 998, 1001 n.20 (1993); *Alliance for Community Media v. FCC*, 56 F.3d 105, 117 (D.C. Cir. 1995) (*en banc*), *cert. granted sub nom. Denver Area Educ. Telecomms. Consortium v. FCC*. 116 S. Ct. 471 (1995).

15/ *See also Infinity Broadcasting Corp.*, 8 FCC Rcd. 6740 (1993).

suggests that enforcement of its indecency regulation involves both government- and self-censorship of such material . . . ." 16/

The search for villains continued with the introduction of Section 505 by Senator Dianne Feinstein. As in these prior cases, *Playboy* was chosen as the subject of Section 505 "block or channel" requirements without regard to any administrative or judicial finding of indecency. In this respect, Senator Feinstein resembles Alice's Red Queen, who declared "sentence first -- verdict afterwards." 17/ In introducing the legislation, she made clear that Playboy was being targeted, stating that "[t]he full blocking requirement would apply to those channels primarily dedicated to adult sexually oriented programming, such as the Playboy and Spice channels." 141 Cong. Rec. S8167 (1995).

Just as the Library of Congress understood what to do with the braille edition of *Playboy* under the heavy hand of Congressman Wiley, the FCC received Senator Feinstein's message loud and clear. The Commission said that the statute was "clear regarding what channels Section [505(a)] applies to" even though no interpretive criteria for what constitutes an "adult-oriented" network were provided in the law or legislative history. It is small wonder then, that the Commission

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16/ *Action for Children's Television v. FCC*, 58 F.3d 654, 685 (D.C. Cir. 1995) (*en banc*) (Wald, J., dissenting), *cert. denied*, 116 S. Ct. 701 (1996) ("*ACT III*").

17/ Lewis Carroll, *Alice's Adventures in Wonderland* 12 (1865).

found it unnecessary even to ask the question of what constitutes a network "primarily dedicated to sexually-oriented programming."

Playboy Entertainment Group, Inc. v. United States

On March 7, 1996, the United States District Court for the District of Delaware issued a Temporary Restraining Order enjoining the federal government, including the Commission, "from enforcing or implementing Section 505 of the Telecommunications Act of 1996 in any manner." *Playboy Entertainment Group, Inc.* attached as Exhibit 1. The TRO was issued one day after a hearing in which Playboy presented evidence and argument that enforcement of Section 505 would impose severe restrictions on its ability to provide service to subscribers.

Playboy argued that Section 505 violates its First and Fifth Amendment rights because it irrationally discriminates among different competitive networks that offer similar, and in some cases, identical programming, all of which is constitutionally protected. Playboy additionally pointed out that Section 505 was unsupported by congressional findings, was both under and over-inclusive and that it failed to employ the least restrictive means of serving the government's asserted interest. Finally, Playboy noted that the government was inappropriately attempting to apply the broadcast indecency standard to pay television, with the net effect of permitting adults only to view what is fit for children. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

Playboy demonstrated the economic impracticality of providing converter/descramblers or traps to comply with Section 505(a). The cost of deploying converter/descramblers with blocking capabilities to households on cable systems carrying the Playboy networks or other adult networks would require a capital investment of well over $1 billion -- more than twelve time the combined annual revenues of all adult networks. 18/ Even if cable operators attempted to deploy the less costly alternative of traps, which do not always prevent audio or video bleeding, it would cost several hundred million dollars, an amount that greatly exceeds the revenues generated by all adult network programming.

Given such costs and the current state of technology, cable operators forced to comply with Section 505 would have no choice economically but to cease to provide adult network programming during significant portions of the day and evening. Indeed, Playboy was notified by various cable operators that Section 505 would force them to remove the Playboy networks during daytime and evening hours.

The Commission's Order and NPRM

On March 5 -- one day before the TRO hearing on Section 505 -- the FCC released its *Order and Notice of Proposed Rulemaking* in this Docket,

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18/ The actual cost may be significantly higher because the average cable household has approximately 1.4 televisions and each television would require a converter/descrambler to prevent audio or video bleeding. Thus, the cost could be well in excess of $1.4 billion.

implementing what it described as certain "self effectuating" provisions of the law, and seeking comment on other aspects of the provision. *Implementation of Section 505 of the Telecommunications Act of 1996*, FCC 96-84, ¶ 3 (released Mar. 5, 1996) ("*Notice*"). The Commission implemented the scrambling requirements of Section 505(a) without prior notice or comment because it concluded that the section "simply incorporates a provision of the 1996 Act" that "involves no discretion." *Id.* at ¶ 3. As to the applicability of Section 505 only to "channels 'primarily dedicated to sexually-oriented programming,'" the Commission without discussion concluded that "the statute is clear regarding what channels Section [505(a)] applies to . . . " *Id.* at ¶ 6. *See also id.* at ¶ 9.

The Commission defined indecency as "any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable or other MVPD medium," *id.* at ¶ 6, and asserted that "the definition of indecent programming in the video programming context is well established." *Id.* at ¶ 9. To further clarify the definition (and presumably answer charges that the statutory language is vague or overly broad), the Commission asserted that "it is clear that the term 'sexually explicit adult programming' in Section [505(a)] is merely a subset of the term 'programming that is indecent.'" *Id.* at ¶¶ 6, 9.

Pursuant to Section 505(b), the Commission adopted an interim rule prohibiting the transmission of "indecent" programming on networks "primarily dedicated" to "sexually-oriented" programming between the hours of 6 a.m. and 10

p.m. At the same time, the *Notice* appeared to dispute the evidence submitted in *Playboy Entertainment Group, Inc.*, that this provision would force cable operators to turn off adult networks for at least two-thirds of the broadcast day. Rather, the Commission interpreted Section 505 "as not requiring the scrambling of programming that is not indecent even if provided on a channel primarily dedicated to sexually-oriented programming." 19/

In other words, the Commission is taking the position that, based upon its "well established" case law for video programming, a cable operator will be able to distinguish between "sexually oriented" (but not indecent) programming on the one hand, and "sexually explicit" programming on the other. Armed with this information, the operator would then be able to scramble and unscramble the adult network as needed, whenever the programming veered from mere sexual orientation to the depths of explicitness. Alternately, the network programmer could use its understanding of this "clear" line to ensure that only acceptable sexually-oriented fare is transmitted before 10 p.m., while reserving the late night hours for "explicit" material. 20/

19/ *Notice* at ¶ 6. It should be noted that the Commission's interpretation is a rather tortured construction of Section 505.

20/ This constructiuon of Section 505 does not take into account differences in time zones. Playboy Television uses only a single satellite transponder to transmit its programming to cable headends. Thus, a program that begins at 10 p.m. Eastern Standard Time would air at 7 p.m. Pacific Time.

Given that the Commission's interpretation was released one day before the TRO hearing in *Playboy Entertainment Group,* it appears to represent more of a statement of the government's litigation strategy than a serious proposal for interpreting and applying Section 505. As such, it is a pastiche of legal fictions that bears no connection to the Commission's indecency decisions or to the real world. The Commission's repeated use of the word "clear" to describe the scope of Section 505 and the case law does not alter reality. Nor can the Commission escape its past decisions in this area simply by ignoring, or failing to disclose them.

In fact, the law of indecency for television programming, whether free or pay, is not well established, and it is not "clear" that "the term 'sexually explicit adult programming' . . . is merely a subset of the term 'programming that is indecent.'" Rather, the Commission's standard for indecency in television programming is exceedingly ambiguous -- and the ambiguities have been magnified by both the Telecommunications Act and the government's current litigation tactics. Worse still, the meaning of the term indecency has been shrouded by a body of largely secret case law that, even when accessed, only adds to the confusion.

Accordingly, the Commission's best hope of salvaging the constitutionality of Section 505 would be to interpret the term "indecency" to be synonymous with "obscenity," as has been done in other cases. 21/

21/ Playboy does not suggest that such a limiting interpretation would be sufficient to save Section 505; only that it is a necessary step. Apart from the inappropriate use of the indecency standard in the pay television context, Section

[Footnote continued]